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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 186

IOWA PUBLIC SERVICE COMPANY,
Petitioner,

vs.

IOWA STATE COMMERCE COMMISSION; DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH; G. J. CHENEY; FLOYD E. DOMINY; STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated and entered in the above case on March 5, 1969.

OPINIONS BELOW.

The opinions of the District Court for the Southern District of Iowa are not reported. They are contained in the Record at pages 31 and 34.

The opinion of the Court of Appeals for the Eighth Circuit (Appendix page A-4 infra) is not as yet reported.

The order of the Iowa State Commerce Commission is not reported and is contained in the Record at page 6.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was dated and entered March 5, 1969 (Appendix page A-12 infra), and copy thereof is appended to this petition in the Appendix at pp. A-4 to A-11. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

The petitioner is a public utility which for many years served certain towns in Iowa with electric service, under franchise and pursuant to rates on file with the appropriate regulatory agencies. Certain of the respondents in July, 1966 offered to serve said towns with electricity, despite an Iowa law designed to prevent such "raiding". Petitioner filed a complaint with the Iowa State Commerce Commission, asking that said Commission find that the action of said respondents was in violation of law and that they be ordered to cease and desist their illegal actions, or that in the alternative, the towns involved, which are public utilities subject to the jurisdiction of the Commerce Commission, cease and desist their actions. The Commerce Commission notified the persons complained against, and a letter was written the Commission on their behalf by a deputy solicitor of the Interior Department. The petitioner requested a hearing, but no hearing was afforded the parties and the complaint was dismissed. The petitioner filed an appeal pursuant to Iowa law, alleging the dismissal was arbitrary and capricious and a

denial of due process. The matter was removed from state court to the Federal District Court, which sustained a motion to dismiss. The Court of Appeals affirmed. The questions presented are:

1. Does the denial of a hearing to petitioner on its complaint constitute a denial of due process, where the applicable law provides that a hearing shall be had and that evidence may be presented only before the administrative agency?

2. Whether the cause was properly retained in Federal Court even though no relief was asked as against the removing parties.

3. Whether the mere fact that a person is a Federal official precludes any hearing on a complaint against them, regardless of the fact that they are alleged to have violated a state law and no justification or excuse for such violation is pleaded.

4. Whether a party who is harmed by the action of a person who is a Federal official is barred by the Supremacy Clause or by the principle of sovereign immunity from having a hearing on a complaint against such a person.

5. Whether the mere fact that federal officials are involved precludes any hearing on a complaint against them where the complaint suggests an alternative means of relief is open to the State Commission by the exercise of admitted jurisdiction over those other than the federal officials.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent portions of the 14th Amendment to the Constitution of the United States, 28 U. S. C., § 1442, and Sections 490A.1, 490A.13, 490A.17 and 490A.24 of the 1966 Code of Iowa (II 1966 Code of Iowa at pages 1965, 1968, 1969, 1970) are set forth in the Appendix at pp. A-1 to A-4.

STATEMENT OF THE CASE.

The petitioner in July of 1966 learned that certain of the respondents offered to serve the towns of Lake View, Wall Lake, Breda, and Hinton, Iowa, with electric service despite the fact that petitioner had contracts with each town for such service. Iowa law provides that no public utility shall offer or furnish electric service to any consumer already receiving electric service from another public utility. Sec. 490A.24 of the 1966 Code of Iowa. Pursuant to the procedure prescribed by Iowa law petitioner filed a complaint with the Iowa State Commerce Commission. Without any motion or pleading by the persons complained against and without any hearing of any kind, the Iowa State Commerce Commission dismissed the complaint. The Iowa law provides for appeal to state court from any arbitrary or capricious action by said Commission, and such an appeal was perfected asking only that the order dismissing the complaint be vacated and a hearing be afforded petitioner by said Commission.

Thereupon the cause was removed by the Federal officials to Federal Court. The removing parties asserted that the cause was removable under 28 U. S. C., Section 1442 (a) (1). Petitioner moved to remand, pointing out that removal was not warranted by 28 U. S. C., Section

1442, since no relief was being asked against the parties removing the action, and no civil action was pending against them. The motion to remand was overruled.

The Federal District Court sustained a motion to dismiss, holding that no hearing was necessary. The Court of Appeals affirmed on the basis of Federal Supremacy and that the action was an unconsented-to suit against the United States.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because the result of the proceedings so far has been to deny to petitioner a hearing on an allegation of serious harm to petitioner caused by certain Federal officials.

The petitioner alleged in the complaint filed that the respondents had violated state law, and this allegation was not denied, the issues never having been made up. The state agency never required the respondent officials even to assert that they were acting lawfully, or to assert that if they were acting contrary to state law they were justified by some overriding law. The result of the proceedings up to this point is that because persons are Federal officials they ipso facto are authorized to commit otherwise illegal acts, for the petitioner has never been afforded a hearing, nor have the officials involved so much as pleaded any justification for their actions. The Court of Appeals in its opinion refers to the Flood Control Act of 1944—but it was never even pleaded that said Act is the authority under which said officials purported to act, and no opportunity was ever afforded the petitioner to develop the facts in this matter. The action in this case was aborted by dismissal before the issues were even made up, and the discussion by the Court of Appeals of the Supremacy Clause is at least premature—because there is nothing in the record to even show that

the actions involved are authorized by any congressional Act. So we do not even reach the question of a conflict between a State law and a Federal law—the defendants have never pleaded anything.

The finding that, even though there was no motion or answer filed by the defendants and no hearing, the petitioner was afforded due process rests on the unpleaded assumption that the defendant officials were acting pursuant to authority of some superior law. Since no pleading or motion was ever filed before the Iowa State Commerce Commission, there is nothing to show that any Federal law authorizes the complained-of actions.

The basic issue in this cause, in its present posture, is: Is a Federal official, by reason of the fact that he is a Federal official, automatically not required to answer for his acts to a State agency? Is he not at least required to show his acts are pursuant to some valid law? If such a course had been followed, the petitioner would have been afforded an opportunity to deny that the law which it is claimed authorized the action was applicable, or to show that the law was invalid. But the procedure followed by the lower courts was arbitrary and a denial of due process.

Additionally, the courts below misinterpreted the removal provisions of 28 U. S. C., § 1442, which requires that before a Federal official can remove an action to Federal Court an action be pending against him. While the Federal officials were named as defendants, the only relief asked in the petition was as against the Iowa State Commerce Commission: that it afford petitioner a hearing on its complaint as provided by law.

The result reached by the lower courts, and the manner of reaching it, represents a substantial departure from the accepted and usual course of judicial proceedings which requires this Court's supervision.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel of Record:

.....

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APPENDIX.

APPENDIX.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Amendment XIV to the U. S. Constitution:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 U. S. C. A. 1442 (a)

"A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Chapter 490A of the 1966 Code of Iowa:

490A.1 "The Iowa state commerce commission shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.

As used in this chapter, 'public utility' shall include any person, partnership, business, association, or corporation, domestic or foreign, owning or operating any facilities for:

1. Furnishing gas by piped distribution system or electricity to the public for compensation . . ."

490A.13 "Any party to any proceeding before the commission who is aggrieved by an order therein

may take an appeal by serving a notice of appeal upon the adverse party or parties and the commission and by filing said notice of appeal with the clerk of the district court of any county wherein the order of the commission or some part thereof is to take effect."

490A.16 "No new or additional evidence shall be introduced in the district court, but the case shall be determined by the court without a jury upon the record and evidence transferred; provided, however, that if any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such evidence is material and competent and that it could not have been offered before the commission or that such party was by the commission denied an opportunity to adduce it, the court shall order such evidence to be taken before the commission forthwith and shall stay further proceedings in the appeal pending return to the court of a record of such evidence."

490A.17 "The court may dismiss the appeal, modify or vacate the order complained of in whole or in part, or remand the matter to the commission for such further proceedings as justice may require. The court shall have jurisdiction to compel commission action unlawfully withheld or unreasonably delayed and the court shall have the power to set aside the commission action, findings and conclusions found to be:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Contrary to constitutional right, power, privilege or immunity.

3. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

4. Unsupported by substantial evidence in view of the entire record as submitted."

490A.24 "No public utility shall construct or extend facilities or furnish or offer to furnish electric service to the point of delivery to any consumer already receiving electric service from another public utility. No public utility shall construct or extend facilities or furnish electric service to a prospective customer not presently being served unless its existing service facilities are nearer the proposed point of delivery than the service facilities of any other utility. Notwithstanding the foregoing provisions of this section, any public utility may extend electric service and transmission lines to its own utility property and facilities or to another public utility for resale, or in case the public utility closest to or presently serving the delivery point consents thereto in writing or the commission after notice and hearing, and due consideration of the preference of the consumer, finds that service from a utility other than the closest utility is in the public interest."

OPINION.

United States Court of Appeals
For the Eighth Circuit.

No. 19,281.

Iowa Public Service Company,
Appellant,

v.

Iowa State Commerce Commission; Dick A. Witt, Frank B. Means and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission; Arnold E. Aldrich; G. J. Cheney; Floyd E. Dominy; Stewart L. Udall; and the U. S. Bureau of Reclamation,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[March 5, 1969.]

Before Gibson and Lay, Circuit Judges, and Harper, Chief District Judge.

Gibson, Circuit Judge.

The plaintiff, Iowa Public Service Company (hereinafter "Company"), sought to restrain the United States government acting through its employees and agents from disposing of electrical power, generated at federal hydro-

electric installations constructed as part of a flood control project, to certain Iowa municipalities. It filed a complaint with the Iowa State Commerce Commission (hereinafter "Iowa Commission") alleging the proposed sale of electric power to certain municipalities being served by the Company to be in violation of Iowa law. The Company viewed the federal officers and agents[1] as a public utility subject to the jurisdiction of the Iowa Commission.

The Iowa Commission investigated and processed the complaint but did not afford the Company a hearing. Its Order of February 6, 1967 made specific findings of fact and conclusions of law fully disposing of the Company's contentions and dismissed the complaint.[2]

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[1] The federal officers and agency listed as defendants are: Stewart L. Udall, Secretary of the Interior; Floyd E. Dominy, Commissioner of the Bureau of Reclamation; Arnold E. Aldrich, Regional Director of the Bureau; G. J. Cheney, Assistant Regional Director; and the U. S. Bureau of Reclamation.

[2] The Iowa Commission Order reads:

"Now, this matter comes to the attention of this Commission on the complaint filed by Iowa Public Service Company on October 11, 1966, a letter received from the United States Department of Interior filed December 7, 1966, and a letter Reply of Complainant Company filed December 19, 1966, and the Commission being fully advised in the premises finds:

"1. That the Respondent, United States Bureau of Reclamation, is not a public utility as defined by Sec. 490A.1, Code of Iowa, 1966.

"2. That the acts of the Respondents complained of are authorized by the Constitution and Laws of the United States and are outside the regulatory jurisdiction of this Commission.

"3. That even if the United States Bureau of Reclamation were a public utility as defined by Sec. 490A.1, the extensions of service complained of are specifically exempted from the provisions of Sec. 490A.24, Code of Iowa, 1966.

"4. That the Commission is satisfied with respect to the Complaint.

"5. That there are no reasonable grounds for investigating said Complaint.

"It Is Therefore Ordered, that the Complaint be, and it is hereby dismissed."

The Company appealed the Order to the Iowa District Court, naming as defendants in addition to the federal officers and the U. S. Bureau of Reclamation, the Iowa Commission and its members. This cause was then removed to the United States District Court for the Southern District of Iowa pursuant to 28 U. S. C., § 1442 (a) (1).[3]

The United States District Court, the Honorable William C. Hanson, on motion, dismissed the complaint, upholding the action of the Iowa Commission and further finding no lack of due process, as contended by the Company, in the Iowa Commission proceedings.[4] A timely appeal was filed

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[3] 28 U. S. C. § 1442 (a) (1) reads:

"(a) A civil action * * * commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *."

Note that when an action is brought against a federal officer as contemplated by 28 U. S. C., § 1442, the federal officer alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court. *Allman v. Hanley*, 302 F. 2d 559, 562 (5 Cir. 1962); *Perez v. Rhiddlehoover*, 247 F. Supp. 65, 70 (E. D. La. 1965).

[4] Judge Hanson disposed of the due process issue with the following analysis:

"Where the Complaint in every aspect affords without question sufficient allegations when taken as true will support a finding, and where there has been sufficient participation for adjudication, there would seem to be no denial of due process. Certainly in this instance, with the record that was before the Commission, they could determine whether or not the respondent, U. S. Bureau of Reclamation, came within the definition of public utility under the Iowa Code as a matter of law. This they have done. They have further held that the acts of the respondent having been authorized by the Constitution and laws of the United States are outside their regulatory jurisdiction. And if the Commission should determine that this matter is beyond their jurisdiction, the Court has no doubt that there was sufficient admitted matter within the confines of the Complaint to make such a ruling."

by the Company. We affirm the decision of the District Court.

We have reviewed the Order of the Iowa Commission and the contentions of the Company, including lack of due process relative thereto, and are of the opinion that the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements. We deem it unnecessary to discuss in detail the findings of the Iowa Commission and all of the contentions of the Company as we think this suit must be dismissed (and the judgment of the District Court affirmed) for at least two reasons.

1. The activities of the federal officials and the United States Bureau of Reclamation, which is merely an organizational division of the Department of the Interior, in offering to furnish hydroelectric power by virtue of congressional authority expressed in 43 U. S. C. 485 h (c)[5] and § 9 (c) of the Flood Control Act of 1944, 58 Stat. 887, 891,[6] are protected by the Supremacy Clause of the United States Constitution, Article VI, from interference by state regulation or control.

2. This is an uncontested suit against the federal government, a sovereign power.

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[5] The Federal Reclamation Laws are found at 43 U. S. C., § 371 *et seq.* and § 485h (c) provides in relevant part:

> "Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost * * *. [I]n said sales or leases preference shall be given to municipalities and other public corporations or agencies * * *."

[6] In pertinent part: "* * * [T]he reclamation and power developments to be undertaken by the Secretary of the Interior under said plans [plans approved for construction pursuant to the Act] shall be governed by the Federal Reclamation Laws * * *."

I.

A state does not possess the power to interfere with or to condition the operation of federal policies constitutionally mandated by Congress. The Supremacy Clause of Article VI of the United States Constitution reads:

> "'This Constitution, and the laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any thing in the Constitution or laws of any State to the Contrary notwithstanding.*" (Emphasis added.)

Chief Justice Marshall in *McCulloch v. Maryland,* 17 U. S. 316, 436 (1819) gave a literal interpretation of the Supremacy Clause:

> "* * * [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

Later applications of the Supremacy Clause amplify its pervasiveness. *Nash v. Florida Industrial Commission,* 389 U. S. 235, 240 (1967), held unconstitutional a Florida statute which withheld unemployment insurance from discharged employees who filed unfair labor practice charges, stating: "[W]e follow the unbroken rule that has come down through the years", citing *McCulloch v. Maryland, supra.* Accord, *Leslie Miller, Inc. v. Arkansas,* 352 U. S. 187 (1956).

In *Public Utilities Commission of California v. United States,* 355 U. S. 534 (1958), the Court held a state statute requiring state Commission approval of negotiated intra-

state rates for shipment of personal property unconstitutional as applied to shipments of federal property. Under federal law procurement officers were authorized to negotiate reduced rates. Under California law the reduced rates could only be operative if the state Commission approved. The Court held the California provision must give way to federal law, again quoting *McCulloch v. Maryland,* at 544 of 355 U. S.:

> "'It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'"

The Court further stated at 544 of 355 U. S.: "The conflict [between the federal policy of negotiated rates and the state policy of regulation of negotiated rates] seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve."

Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania, 318 U. S. 261 (1943) relied on by the Company is inapposite. There a state regulation set the minimum price at which private contractors could sell milk to the government. The Court noted that those who contract to furnish supplies or render services to the government are not governmental agencies and do not perform governmental functions, and held the state regulation "imposes no prohibition on the national government or its officers." 269-270 of 318 U. S.

The Company does not challenge the constitutional authority of Congress to pass the Flood Control Act of 1944 with its provision for the disposal of electrical energy. See, *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 330-340 (1936). The United States government in selling this electrical energy is free to do so without direction or control by state law or regulation.

II.

The principle of a sovereign's immunity from suit needs no elaboration. "The United States, as sovereign, is immune from suit, save as it consents to be sued." *United States v. Sherwood,* 312 U. S. 584, 586 (1941); *Konecny v. United States,* 388 F. 2d 59, 62 (8 Cir. 1967), and cases cited. The Company cites no statute authorizing the present action, and we find none.

The contention of the Company that it is not seeking to restrain the federal government but only federal officials is wholly lacking in substance. There is no claim that the federal defendants are acting beyond or in excess of their statutory authority. Where individual federal officials are sued, the test applied in determining whether the suit is directed against the sovereign is cogently set forth in *Larson, War Assets Administrator and Surplus Property Administrator v. Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 688 (1949):

> "In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained."

And, in *Dugan v. Rank,* 372 U. S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar,* 330 U. S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Corp., supra,* at 704; *Ex parte New York,* 256 U. S. 490, 502 (1921)."

And, in *Hawaii v. Gordon*, 373 U. S. 57, 58 (1963): "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."

This is clearly a suit against the United States. Here the direct effect of the relief sought by the Company would be to restrain the United States, through the Bureau of Reclamation of the Department of the Interior, from carrying out the congressional mandate of the Flood Control Act of 1944 to sell power generated at federal projects to municipalities and also to deprive the United States of the proceeds that could be obtained for the power, proceeds intended by Congress to be applied to the cost of the projects.

The suit by the Company is an unconsented suit against the United States and, as such, is subject to dismissal; and the suit must be dismissed because the Supremacy Clause of the Constitution commands that federal law is paramount to state law and regulatory policies in regard to the congressionally mandated activity of the federal defendants.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 19281 September Term, 1968.

Iowa Public Service Company,
Appellant,

vs.

Iowa State Commerce Commission, Dick A. Witt, Frank B. Means, and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission; Arnold E. Aldrick; G. J. Cheney; Floyd E. Dominy; Stewart L. Udall; and The U. S. Bureau of Reclamation,
Appellees.

Appeal From the United States District Court for the Southern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 5, 1969

Costs taxed in favor of appellees, U. S. Bureau of Reclamation, et al:

Cost of printing brief of appellees $9.50

Total costs taxed $9.50

A true copy.

Attest:

Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

March 28th, 1969.